TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 913

AMERICAN CHICLE COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JANUARY 30, 1942.

CERTIORARI GRANTED MARCH 9, 1942.

SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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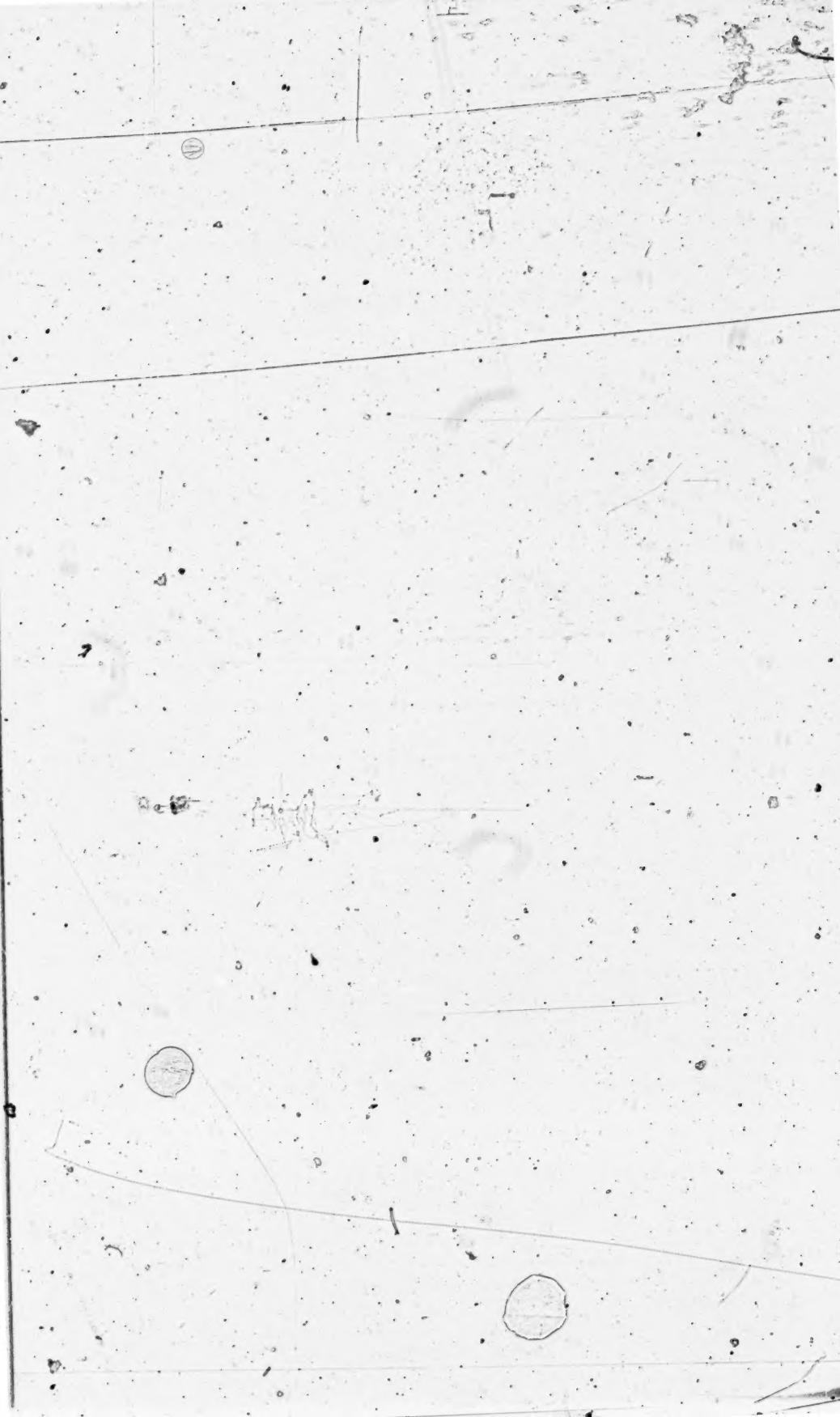

[fol. 1]

IN THE COURT OF CLAIMS OF THE UNITED STATES

No. 45209

AMERICAN CHICLE COMPANY

v.

THE UNITED STATES OF AMERICA

I. PETITION—Filed June 15, 1940

To the Honorable, the Chief Justice and the Associate Justices of the Court of Claims of the United States:

The claimant respectfully represents:

1. The claimant at all times hereinafter mentioned was and is a domestic corporation organized and existing under the laws of the State of New Jersey, with offices and a place of business in Long Island City in the State of New York.

2. The claimant files this petition to recover from the United States $7,027.68 income taxes for the calendar year 1936 with interest thereon, $36.32 income taxes for the calendar year 1937 with interest thereon, and $10,528.83 income taxes for the calendar year 1938 with interest thereon, [fol. 2] which amounts were erroneously and illegally assessed against and collected from the claimant by the United States Collector of Internal Revenue for the first district of New York on the dates hereafter mentioned.

3. Section 131 of the Revenue Act of 1936, which governed the calendar years 1936 and 1937, provided in part as follows:

"(a) Allowance of Credit.—If the taxpayer signifies in his return his desire to have the benefits of this section, the tax imposed by this title shall be credited with:

"(1) Citizen and Domestic Corporation.—In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war-profits, and excess-profits taxes paid or accrued during the taxable year to

any foreign country or to any possession of the United States;

* * * * * * *

"(f) Taxes of Foreign Subsidiary.—For the purposes of this section a domestic corporation which owns a majority of the voting stock of a foreign corporation from which it receives dividends in any taxable year shall be deemed to have paid the same proportion of any income, war-profits, or excess-profits taxes paid by such foreign corporation to any foreign country or to any possession of the United States, upon or with respect to the accumulated profits of such foreign corporation from which such dividends were paid, which the amount of such dividends bears to the amount of such accumulated profits: *Provided*, That the amount of tax deemed to have been paid under this subsection shall in no case exceed the same proportion of the tax against which credit is taken which the amount of such dividends bears to the amount of the entire net income of the domestic corporation in which such dividends are included. The term 'accumulated profits' when used in this [fol. 3] subsection in reference to a foreign corporation, means the amount of its gains, profits, or income in excess of the income, war-profits, and excess-profits taxes imposed upon or with respect to such profits or income; and the Commissioner with the approval of the Secretary shall have full power to determine from the accumulated profits of what year or years such dividends were paid; treating dividends paid in the first sixty days of any year as having been paid from the accumulated profits of the preceding year or years (unless to his satisfaction shown otherwise), and in other respects treating dividends as having been paid from the most recently accumulated gains, profits, or earnings. In the case of a foreign corporation, the income, war-profits, and excess-profits taxes of which are determined on the basis of an accounting period of less than one year, the word 'year' as used in this subsection shall be construed to mean such accounting period."

Section 131 of the Revenue Act of 1938, which governed the calendar year 1938, was the same. Neither statute is different in any material respect from § 131 of the Revenue Act of 1928, nor from the corresponding provision in every Revenue Act from and including 1921 to the present date.

4. In *International Milling Co.* v. *United States*, 89 C. Cls. 128, decided May 29, 1939, this Court decided that under the proper construction of § 131 the amount of the foreign tax which is allowable as a credit should not be reduced by applying the ratio of the "accumulated profits" to the "total profits" of the subsidiary. This Court held that the proper formula was to divide the dividends received by the accumulated profits of the subsidiary, and to compute the [fol. 4] credit by applying this ratio to the foreign tax accrued or paid. In reaching this result, this Court said that the failure to use "accumulated profits" as defined in the statute—

"is in fact, as we view it, merely a mathematical device for avoiding the method prescribed by the statute which directs in ascertaining the amount of tax paid that the same proportion shall be taken of the taxes paid to the foreign country which the 'amount of such dividends bears to the amount of such accumulated profits,' and in the same paragraph 'accumulated profits' when used in this section are defined to be 'the amount of its gains, profits, or income in excess of the income, war-profits, and excess-profits taxes imposed upon or with respect to such profits or income.' Instead of taking the ratio of the dividends received to accumulated profits, as directed by the statute, the Commissioner used, as shown above, the ratio of dividends received to the *total* profits of the subsidiary."

No petition for certiorari to review the decision in the *International Milling* case was filed, and the judgment has become final.

5. In its returns for each of the years 1936, 1937, and 1938, the claimant signified its desire to have the benefits of § 131.

6. (A) The claimant filed its federal income tax return for the calendar year 1936 with the Collector of Internal Revenue for the first district of New York on March 13, 1937. The tax shown as due on this return was $603,377.75, and this tax was paid in three equal installments of $150,844.44 each on March 13, 1937, June 15, 1937, and September 14, 1937, respectively, and one payment of $150,844.43 on December 14, 1937. Thereafter, an additional assess- [fol. 5] ment of $4,865.86 was made, and this tax with in-

terest was paid on February 28, 1938. A further additional assessment of $6,657.56 was thereafter made, and this tax, with interest, was paid on January 17, 1940.

(B) During all times relevant with respect to the taxable year 1936, the claimant was the sole stockholder of two foreign subsidiaries, the Canadian Chewing Gum Company, Ltd., and American Chicle Company of Mexico, S. A. In filing its return for the year 1936, the claimant computed its credit for taxes paid by these subsidiaries in accordance with the so-called "new" Form 1118, referred to by this Court in its findings of fact and opinion in the *International Milling* case above referred to. In so computing the credit, the claimant reduced the credit by applying the ratio of the "accumulated profits" to the "total profits" in the case of each subsidiary. This reduction was not in accordance with the statute as construed by this Court in the *International Milling* case. The effect of this erroneous reduction of the credit, with respect to taxes paid by the Canadian Chewing Gum Company, Ltd., was to reduce the credit by the amount of $6,899.40. The effect of this erroneous reduction of the credit, with respect to taxes paid by American Chicle Company of Mexico, S. A., was to reduce the credit by the amount of $128.28. As a consequence, the claimant has overpaid its tax for the year 1936 by the aggregate of these two sums, or a total of $7,027.68.

7. (A) The claimant filed its federal income tax return for the calendar year 1937 with the Collector of Internal Revenue for the first district of New York on March 15, 1938. The tax shown as due on this return was $619,618.24, [fol. 6] and this tax was paid in four equal installments of $154,904.56 each on March 15, 1938, June 14, 1938, September 14, 1938, and December 14, 1938, respectively. Thereafter, an additional assessment of $11,393.76 was made, and this tax, with interest, was paid on January 17, 1940.

(B) During all times relevant to the taxable year 1937, the claimant was the sole stockholder of a foreign subsidiary, American Chicle Company of Mexico, S. A. In filing its return for the year 1937, the claimant computed its credit for taxes paid by this subsidiary in accordance with the construction of § 131 which this Court has approved in the *International Milling* case above referred to, that is, the claimant did not reduce the credit by applying the ratio of

the "accumulated profits" to the "total profits" of the subsidiary. Thereafter, in auditing the claimant's return, the officers of the Treasury made certain adjustments and assessed the additional tax of $11,393.76 for the year 1937 above referred to. In computing this additional tax, the credit for foreign taxes paid by the American Chicle Company of Mexico, S. A., was determined in accordance with the so-called "new" Form 1118, above referred to, that is, the credit was reduced by applying the ratio of the "accumulated profits" to the "total profits" of the subsidiary. This reduction was not in accordance with the statute as construed by this Court in the *International Milling* case. The effect of this erroneous reduction of the credit was to reduce the credit by the amount of $36.32. As a consequence, the claimant has overpaid its tax for the year 1937 by the amount of $36.32.

[fol. 7] 8. (A) The claimant filed its federal income tax return for the calendar year 1938 with the Collector of Internal Revenue for the first district of New York on March 14, 1939. The tax shown as due on this return was $692,075.93, and this tax was paid, in one installment of $173,018.99 on March 14, 1939, and in three equal installments of $173,018.98 on June 14, 1939, September 12, 1939, and December 14, 1939, respectively. Thereafter, an additional assessment of $3,781.92 was made, and this tax, with interest, was paid on January 17, 1940.

(B) During all times relevant to the taxable year 1938, the claimant was the sole stockholder of three foreign subsidiaries, the Canadian Chewing Gum Company, Ltd., Canadian Chewing Gum Sales, Ltd., and Chicle Adams, S. A. In filing its return for the year 1938, the claimant computed its credit for taxes paid by these subsidiaries in accordance with the construction of § 131 which this Court has approved in the *International Milling* case above referred to, that is, the claimant did not reduce the credit by applying the ratio of the "accumulated profits" to the "total profits" of the subsidiary. Thereafter, in auditing the claimant's return, the officers of the Treasury made certain adjustments and assessed the additional tax of $3,781.92 above referred to. In computing this additional tax, the credit for foreign taxes paid by the three subsidiaries was determined in accordance with the so-called "new" Form 1118 above referred to, that is, the credit was reduced by applying the ratio of the "ac-

cumulated profits" to the "total profits" in the case of each [fol. 8] subsidiary. This reduction was not in accordance with the statute as construed by this Court in the *International Milling* case. The effect of this erroneous reduction of the credit, with respect to taxes paid by the Canadian Chewing Gum Company, Ltd., was to reduce the credit by the amount of $8,181.58. The effect of this erroneous reduction of the credit, with respect to taxes paid by Canadian Chewing Gum Sales, Ltd., was to reduce the credit by the amount of $2,332.17. The effect of this erroneous reduction of the credit, with respect to taxes paid by Chicle Adams, S. A., was to reduce the credit by the amount of $15.08. As a consequence, the claimant has overpaid its tax for the year 1938 by the aggregate of these three sums, or a total of $10,528.83.

9. On December 21, 1939, the claimant filed claims for refund in the sum of $7,027.68 for the calendar year 1936, in the sum of $36.32 for the calendar year 1937, and in the sum of $10,528.83 for the calendar year 1938. These claims set forth as their bases and grounds the facts alleged in paragraphs 4, 5, 6, 7, and 8 of this petition. Each claim relied specifically on the decision of this Court in *International Milling Co.* v. *United States*, 89 C. Cls. 128, and on the decision of the Circuit Court of Appeals for the Second Circuit in *F. W. Woolworth Co.* v. *United States*, 91 F. (2d) 973, in which certiorari was denied by the Supreme Court, 302 U. S. 768. The claims also included schedules in which the details of the computations of the foreign tax credits were set forth, showing precisely the bases for the figures stated in this petition. As it is not believed that there is any dispute about these computations, it has not been deemed necessary to repeat these details here.

[fol. 9] 10. Thereafter, by letter dated May 21, 1940, the Commissioner gave notice that the three claims referred to in the preceding paragraph were disallowed. The only reason stated for the disallowance was that the claims were "based on International Milling Co. decision. Information on file in Brooklyn Div. indicates that this decision has not been acquiesced in by the Commissioner." No part of the taxes paid for the years 1936, 1937, or 1938 has been repaid to the claimant by way of credit, refund, or otherwise.

11. The claimant has at all times borne true allegiance to the Government of the United States, and has never in any

way aided, abetted, or given encouragement to rebellion against the United States. The claimant is the sole and absolute owner of the claim herein presented, and has not made any transfer or assignment of said claim or any part thereof. The claimant is justly entitled to recover the amount claimed, after allowing all just credits and offsets.

12. Wherefor, the claimant, American Chicle Company, claims from the United States the sum of $17,592.83, with interest thereon at the rate of six per cent per annum from the dates of payment thereof.

American Chicle Company, by Erwin N. Griswold, Attorney for Claimant, Langdell Hall, Cambridge, Massachusetts.

[fol. 10] *Duly sworn to by Erwin N. Griswold. Jurat omitted in printing.*

[fol. 11] IN THE COURT OF CLAIMS OF THE UNITED STATES

No. 45439

AMERICAN CHICLE COMPANY

v.

THE UNITED STATES OF AMERICA

II. PETITION—Filed April 29, 1941

To the Honorable, the Chief Justice and the Associate Justices of the Court of Claims of the United States:

The claimant respectfully represents:

1. The claimant at all times hereinafter mentioned was and is a domestic corporation organized and existing under the laws of the State of New Jersey, with offices and a place of business in Long Island City in the State of New York.

2. The claimant files this petition to recover from the United States $7,027.68 income taxes for the calendar year 1936 with interest thereon, $36.32 income taxes for the calendar year 1937 with interest thereon, and $10,528.83 income taxes for the calendar year 1938 with interest thereon, which amounts were erroneously and illegally [fol. 12] assessed against and collected from the claimant

by the United States Collector of Internal Revenue for the first district of New York on the dates hereafter mentioned.

3. Section 131 of the Revenue Act of 1936, which governed the calendar years 1936 and 1937, provided in part as follows:

"(a) Allowance of Credit.—If the taxpayer signifies in his return his desire to have the benefits of this section, the tax imposed by this title shall be credited with:

"(1) Citizen and Domestic Corporation.—In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war-profits, and excess-profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States;

. . . . . .

"(f) Taxes of Foreign Subsidiary.—For the purposes of this section a domestic corporation which owns a majority of the voting stock of a foreign corporation from which it receives dividends in any taxable year shall be deemed to have paid the same proportion of any income, war-profits, or excess-profits taxes paid by such foreign corporation to any foreign country or to any possession of the United States, upon or with respect to the accumulated profits of such foreign corporation from which such dividends were paid, which the amount of such dividends bears to the amount of such accumulated profits: *Provided*, That the amount of tax deemed to have been paid under this subsection shall in no case exceed the same proportion of the tax against which credit is taken which the amount of such dividends bears to the amount of the entire net income of the domestic corporation in which such dividends are included. The term 'accumulated profits' when used in this [fol. 13] subsection in reference to a foreign corporation, means the amount of its gains, profits, or income in excess of the income, war-profits, and excess-profits taxes imposed upon or with respect to such profits or income; and the Commissioner with the approval of the Secretary shall have full power to determine from the accumulated profits of what year or years such dividends were paid; treating dividends paid in the first sixty days of any year as having been paid from the accumulated profits of the preceding year or years (unless to his satisfaction shown otherwise),

and in other respects treating dividends as having been paid from the most recently accumulated gains, profits, or earnings. In the case of a foreign corporation, the income, war-profits, and excess-profits taxes of which are determined on the basis of an accounting period of less than one year, the word 'year' as used in this subsection shall be construed to mean such accounting period."

Section 131 of the Revenue Act of 1938, which governed the calendar year 1938, was the same. Neither statute is different in any material respect from § 131 of the Revenue Act of 1928, nor from the corresponding provision in every Revenue Act from and including 1921 to the present date.

4. In *International Milling Co.* v. *United States*, 89 C. Cls. 128, decided May 29, 1939, this Court decided that under the proper construction of § 131 the amount of the foreign tax which is allowable as a credit should not be reduced by applying the ratio of the "accumulated profits" to the "total profits" of the subsidiary. This Court held that the proper formula was to divide the dividends received by the accumulated profits of the subsidiary, and to compute the [fol. 14] credit by applying this ratio to the foreign tax accrued or paid. In reaching this result, this Court said that the failure to use "accumulated profits" as defined in the statute—

"is in fact, as we view it, merely a mathematical device for avoiding the method prescribed by the statute which directs in ascertaining the amount of tax paid that the same proportion shall be taken of the taxes paid to the foreign country which the 'amount of such dividends bears to the amount of such accumulated profits,' and in the same paragraph 'accumulated profits' when used in this section are defined to be 'the amount of its gains, profits, or income in excess of the income, war-profits, and excess-profits taxes imposed upon or with respect to such profits or income.' Instead of taking the ratio of the dividends received to accumulated profits, as directed by the statute, the Commissioner used, as shown above, the ratio of dividends received to the *total* profits of the subsidiary."

No petition for certiorari to review the decision in the *International Milling* case was filed, and the judgment has become final.

5. In its returns for each of the years 1936, 1937, and 1938, the claimant signified its desire to have the benefits of § 131.

6. (A) The claimant filed its federal income tax return for the calendar year 1936 with the Collector of Internal Revenue for the first district of New York on March 13, 1937. The tax shown as due on this return was $603,377.75, and this tax was paid in three equal installments of $150,844.44 each on March 15, 1937, June 16, 1937, and September 16, 1937, respectively, and one payment of $150,844.43 on December 15, 1937. Thereafter, an additional assess-[fol. 15] ment of $4,865.86 was made, and this tax with interest of $270.02 was satisfied by the payment of $4,835.35 on March 4, 1938, and a credit of $300.53 on July 7, 1938. A further additional assessment of $6,657.56 was thereafter made, and this tax, with interest, a total of $7,027.68, was paid on January 17, 1940.

(B) During all times relevant with respect to the taxable year 1936, the claimant was the sole stockholder of two foreign subsidiaries, the Canadian Chewing Gum Company, Ltd., and American Chicle Company of Mexico, S. A. In filing its return for the year 1936, the claimant computed its credit for taxes paid by these subsidiaries in accordance with the so-called "new" Form 1118, referred to by this Court in its findings of fact and opinion in the *International Milling* case above referred to. In so computing the credit, the claimant reduced the credit by applying the ratio of the "accumulated profits" to the "total profits" in the case of each subsidiary. This reduction was not in accordance with the statute as construed by this Court in the *International Milling* case. The effect of this erroneous reduction of the credit, with respect to taxes paid by the Canadian Chewing Gum Company, Ltd., was to reduce the credit by the amount of $6,899.40. The effect of this erroneous reduction of the credit, with respect to taxes paid by American Chicle Company of Mexico, S. A., was to reduce the credit by the amount of $128.28. As a consequence, the claimant has overpaid its tax for the year 1936 by the aggregate of these two sums, or a total of $7,027.68.

7. (A) The claimant filed its federal income tax return for the calendar year 1937 with the Collector of Internal

[fol. 16] Revenue for the first district of New York on March 15, 1938. The tax shown as due on this return was $619,618.24, and this tax was paid in four equal installments of $154,904.56 each on March 15, 1938, June 16, 1938, September 16, 1938, and December 14, 1938, respectively. Thereafter, an additional assessment of $11,393.76 was made, and this tax, with interest, a total of $12,640.67, was paid on January 17, 1940.

(B) During all times relevant to the taxable year 1937, the claimant was the sole stockholder of a foreign subsidiary, American Chicle Company of Mexico, S. A. In filing its return for the year 1937, the claimant computed its credit for taxes paid by this subsidiary in accordance with the construction of § 131 which this Court has approved in the *International Milling* case above referred to, that is, the claimant did not reduce the credit by applying the ratio of the "accumulated profits" to the "total profits" of the subsidiary. Thereafter, in auditing the claimant's return, the officers of the Treasury made certain adjustments and assessed the additional tax of $11,393.76 for the year 1937 above referred to. In computing this additional tax, the credit for foreign taxes paid by the American Chicle Company of Mexico, S. A., was determined in accordance with the so-called "new" Form 1118, above referred to, that is, the credit was reduced by applying the ratio of the "accumulated profits" to the "total profits" of the subsidiary. This reduction was not in accordance with the statute as construed by this Court in the *International Milling* case. The effect of this erroneous reduction of the credit was to [fol. 17] reduce the credit by the amount of $36.32. As a consequence, the claimant has overpaid its tax for the year 1937 by the amount of $36.32.

8. (A) The claimant filed its federal income tax return for the calendar year 1938 with the Collector of Internal Revenue for the first district of New York on March 14, 1939. The tax shown as due on this return was $692,075.93, and this tax was paid, in one installment of $173,018.99 on March 15, 1939, and in three equal installments of $173,018.98 on June 15, 1939, September 12, 1939, and December 14, 1939, respectively. Thereafter, an additional assessment of $3,781.92 was made, and this tax, with interest, a total of $3,968.89, was paid on January 17, 1940.

(B) During all times relevant to the taxable year 1938, the claimant was the sole stockholder of three foreign subsidiaries, the Canadian Chewing Gum Company, Ltd., Canadian Chewing Gum Sales, Ltd., and Chicle Adams, S. A. In filing its return for the year 1938, the claimant computed its credit for taxes paid by these subsidiaries in accordance with the construction of § 131 which this Court has approved in the *International Milling* case above referred to, that is, the claimant did not reduce the credit by applying the ratio of the "accumulated profits" to the "total profits" of the subsidiary. Thereafter, in auditing the claimant's return, the officers of the Treasury made certain adjustments and assessed the additional tax of $3,781.92 above referred to. In computing this additional tax, the credit for foreign taxes paid by the three subsidiaries was determined in accordance with the so-called "new" Form 1118 above referred [fol. 18] to, that is, the credit was reduced by applying the ratio of the "accumulated profits" to the "total profits" in the case of each subsidiary. This reduction was not in accordance with the statute as construed by this Court in the *International Milling* case. The effect of this erroneous reduction of the credit, with respect to taxes paid by the Canadian Chewing Gum Company, Ltd., was to reduce the credit by the amount of $8,181.58. The effect of this erroneous reduction of the credit, with respect to taxes paid by Canadian Chewing Gum Sales, Ltd., was to reduce the credit by the amount of $2,332.17. The effect of this erroneous reduction of the credit, with respect to taxes paid by Chicle Adams, S. A., was to reduce the credit by the amount of $15.08. As a consequence, the claimant has overpaid its tax for the year 1938 by the aggregate of these three sums, or a total of $10,528.83.

9. On February 4, 1941, the claimant filed three claims for refund, in the sum of $7,027.68 for the calendar year 1936, in the sum of $36.32 for the calendar year 1937, and in the sum of $10,528.83 for the calendar year 1938. These claims set forth as their bases and grounds the facts alleged in paragraphs 4, 5, 6, 7, and 8 of this petition. Each claim relied specifically on the decision of this Court in *International Milling Co.* v. *United States*, 89 C. Cls. 128, and on the decision of the Circuit Court of Appeals for the Second Circuit in *F. W. Woolworth Co.* v. *United States*, 91 F. (2d)

973, in which certiorari was denied by the Supreme Court, 302 U. S. 768. The claims also included schedules in which the details of the computations of the foreign tax credits were set forth, showing precisely the bases for the figures stated in this petition.

[fol. 19] 10. Thereafter, by letter dated April 22, 1941, the Commissioner gave notice that the three claims referred to in the preceding paragraph were disallowed. No part of the taxes paid for the years 1936, 1937, or 1938 has been repaid to the claimant by way of credit, refund, or otherwise.

11. The claimant has at all times borne true allegiance to the Government of the United States, and has never in any way aided, abetted, or given encouragement to rebellion against the United States. The claimant is the sole and absolute owner of the claim herein presented, and has not made any transfer or assignment of said claim or any part thereof. The claimant is justly entitled to recover the amount claimed, after allowing all just credits and offsets.

12. Wherefor, the claimant, American Chicle Company, claims from the United States the sum of $17,592.83, with interest thereon at the rate of six per cent per annum from the dates of payment thereof.

American Chicle Company, by Erwin N. Griswold, Attorney for Claimant, Langdell Hall, Cambridge, Massachusetts.

[fol. 20] *Duly sworn to by Erwin N. Griswold. Jurat omitted in printing.*

[fols. 21-22] III. General Traverse—Filed June 26, 1940, and May 9, 1941

And now comes the Attorney General, on behalf of the United States, and answering the petitions of claimant herein, denies each and every allegation therein contained; and asks judgment that the petitions be dismissed.

Samuel O. Clark, Jr., Assistant Attorney General;
F. K. D.

E. B. D.

IV. Argument and Submission of Cases

On June 3, 1941, the cases were argued and submitted together on merits by Mr. Erwin N. Griswold for plaintiff, and by Mrs. Elizabeth B. Davis for defendant.

[fol. 23] **V. Special Findings of Fact, Conclusion of Law and Opinion of the Court by Madden, J., and Dissenting Opinion by Whaley, Chief Justice**—Filed November 3, 1941

Mr. Erwin N. Griswold for the plaintiff.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The above cases having been submitted to the Court of Claims, the court, upon the basis of a stipulation of facts by the parties, makes the following

Special Findings of Fact

1. Plaintiff is a domestic corporation organized and existing under the laws of the State of New Jersey, with offices and a place of business in Long Island City in the State of New York.

2. In its income-tax returns for each of the years 1936, 1937, and 1938, plaintiff signified its desire to have the benefits of section 131 of the Revenue Acts of 1936 and 1938.

[fol. 24] 3. Plaintiff filed its federal income-tax return for the calendar year 1936 with the Collector of Internal Revenue for the first district of New York on March 13, 1937. The tax shown as due on this return was $603,377.75, and this tax was paid in three equal instalments of $150,844.44 each on March 15, 1937, June 16, 1937, and September 16, 1937, respectively, and one payment of $150,844.43 on December 15, 1937. Thereafter an additional assessment of $4,865.86 was made, and this tax with interest of $270.02 was satisfied by the payment of $4,835.35 on March 4, 1938, and a credit of $300.53 on July 7, 1938. A further additional assessment of $6,657.56 was thereafter made, and this tax, with interest, a total of $7,027.68, was paid on January 17, 1940.

4. Plaintiff filed its federal income-tax return for the calendar year 1937 with the Collector of Internal Revenue for the first district of New York on March 15, 1938. The tax shown as due on this return was $619,018.24, and this tax was paid in four equal installments of $154,904.56 each, on March 15, 1938, June 16, 1938, September 16, 1938, and December 14, 1938, respectively. Thereafter, an additional assessment of $11,393.76 was made, and this tax, with interest, a total of $12,640.67, was paid on January 17, 1940.

5. Plaintiff filed its federal income-tax return for the calendar year 1938 with the Collector of Internal Revenue for the first district of New York on March 14, 1939. The tax shown as due on this return was $692,075.93, and this tax was paid, in one installment of $173,018.99 on March 15, 1939, and in three equal installments of $173,018.98 on June 15, 1939, September 12, 1939, and December 14, 1939, respectively. Thereafter, an additional assessment of $3,781.92 was made, and this tax, with interest, a total of $3,968.89, was paid on January 17, 1940.

6. During the taxable years 1936 and 1937 plaintiff was the sole stockholder of two foreign subsidiaries, the Canadian Chewing Gum Company, Ltd., and American Chicle Company of Mexico, S. A., and during 1938 it was the sole stockholder of the Canadian Chewing Gum Company, Ltd., and of the Canadian Chewing Gum Sales, Ltd., and of the Chicle Adams, S. A., all foreign corporations.

[fol. 25] 7. In computing the credit to plaintiff for foreign taxes paid by its foreign subsidiaries under sections 131 of the Revenue Acts of 1936 and 1938 (49 Stat. 1648, 1682, and 52 Stat. 447, 490, respectively) for each of the taxable years 1936, 1937, and 1938 the Commissioner of Internal Revenue used the following formula:

$$\text{Foreign tax accrued or paid} \times \frac{\text{Accumulated profits of subsidiary}}{\text{Total profits of subsidiary}} \times \frac{\text{Dividends received}}{\text{Accumulated profits of subsidiary}} = \text{Taxes deemed to have been paid on profits distributed as dividends.}$$

Plaintiff contends that the following formula should have been used:

$$\frac{\text{Dividends received}}{\text{Accumulated profits of the subsidiary}} \times \text{Foreign tax accrued or paid} = \text{Credit.}$$

Typical examples of the method of computation used by the Commissioner and the method contended for by plaintiff are as follows:

Computation of foreign tax credit according to "new" Form 1118 as applied by Commissioner in determining taxes paid by plaintiff

YEAR: 1936

SUBSIDIARY: CANADIAN CHEWING GUM COMPANY, LTD.

1. Amount received during the taxable year as dividends from such controlled foreign corporation in foreign money			298,850.57
which (converted at an exchange rate of 100.05) equals in dollars			$299,000.00
Date and amount of each dividend payment, December 18, 1936			$299,000.00
2. Entire net income of domestic corporation			$4,047,642.90
3. Total tax due United States			$661,318.67
4. Dividends paid out of accumulated profits by years	*1936* $151,031.39	*1935* $129,662.28	*1932* $18,306.33
5. Total profits of foreign corporation before tax was deducted therefrom	176,865.45	149,100.55	158,419.00
[fol. 26]			
6. Accumulated profits (total profits less tax thereon) out of which dividends	*1936*	*1935*	*1932*
were paid	$150,955.91	$129,597.48	$142,849.13
Converted at the rate of	100.05	100.05	100.05
Equals in dollars	151,031.39	129,662.28	142,849.13
7. Amount of tax payments in dollars	25,834.06	19,438.27	15,569.87
8. Ratio of accumulated profits to total profits	85.39%	86.96%	90.17%
9. Tax paid on or with respect to accumulated profits	22,059.70	16,903.52	14,039.35
10. Ratio of amount of dividends received to accumulated profits	100%	100%	12.82%
11. Amount of tax payments deemed to have been paid on profits distributed as dividends	22,059.70	16,903.52	1,799.84
14. Amounts of tax payments made by foreign corporation which are deemed to have been paid by the domestic corporation	22,059.70	16,903.52	1,799.84
15. Total of tax payments deemed to have been paid on profits distributed as dividends (total of item 14)			$40,763.06

Computation of foreign tax credit according to plaintiff's contention

YEAR: 1936

SUBSIDIARY: CANADIAN CHEWING GUM COMPANY, LTD.

1. Amount received during the taxable year as dividends from such controlled foreign corporation in foreign money	298,850.57
which (converted at an exchange rate of 100.05) equals in dollars	$299,000.00
Date and amount of each dividend payment, December 18, 1936	$299,000.00

2. Entire net income of domestic corporation			$4,047,642.90
3. Total tax due United States			661,318.67
4. Dividends paid out of accumulated profits by years	*1936* $150,335.63	*1935* $126,735.47	*1932* $21,928.90
6. Accumulated profits (total profits less tax thereon) out of which dividends were paid, in dollars	150,335.63	126,735.47	142,849.13

[fol. 27]

7. Amount of tax payments in dollars	*1936* $25,834.06	*1935* $19,438.27	*1932* $15,569.87
10. Ratio of amount of dividends received to accumulated profits	100%	100%	15.351%
11. Amount of tax payments deemed to have been paid on profits distributed as dividends	25,834.06	19,438.27	2,390.13
14. Amounts of tax payments made by foreign corporation which are deemed to have been paid by the domestic corporation	25,834.06	19,438.27	2,390.13
15. Total of tax payments deemed to have been paid on profits distributed as dividends (total of item 14)			$47,662.46

8. The credits allowed by the Commissioner of Internal Revenue and the credits to which plaintiff claims it is entitled for each of the years are as follows:

Year 1936

Subsidiary	Credit allowed	Credit claimed	Additional credit to which plaintiff is entitled, if his position is correct
Canadian Chewing Gum Co., Ltd	$40,763.06	$47,662.46	$6,899.40
American Chicle Co. of Mexico, S. A	1,958.23	2,086.51	128.28
Year 1937			
American Chicle Co. of Mexico, S. A	576.32	612.64	36.32
Year 1938			
Canadian Chewing Gum Co., Ltd	50,430.95	58,612.53	8,181.58
Canadian Chewing Gum Sales, Ltd	13,500.00	15,832.17	2,332.17
Chicle Adams, S. A	293.61	308.69	15.08

9. On December 21, 1939, plaintiff filed three claims for refund for the years 1936, 1937 and 1938, respectivgly, upon the ground that the credit for foreign taxes had been erroneously computed according to the provisions of section 131 (f) of the Revenue Act of 1936 (and 1938 in so far as [fol. 28] the year 1938 was involved), and that the correct computation of the credit allowable was shown in exhibits

attached thereto. These exhibits presented the same facts as those shown in the foregoing findings of fact. These claims for refund were rejected and plaintiff was advised of such rejection by registered letter dated May 21, 1940. Each claim was rejected on the ground that the decision of *International Milling Co.* v. *United States*, 89 C. Cls. 128, "has not been acquiesced in by the Commissioner." No other ground was stated for the rejection of any of the claims. No part of the taxes paid for the years 1936, 1937 or 1938 has been repaid to the plaintiff by way of credit, refund or otherwise. These claims for refund were filed by plaintiff prior to the time that a portion of the taxes claimed had been paid.

10. On February 6, 1941, plaintiff filed three claims for refund for the years 1936, 1937, and 1938, respectively, upon the ground that the credit for foreign taxes had been erroneously computed according to the provisions of section 131 (f) of the Revenue Act of 1936 (and 1938 insofar as the year 1938 was involved), and that the correct computation of the credit allowable was shown in exhibits attached thereto. These exhibits presented the same facts as those shown in the foregoing findings of fact. These claims for refund were rejected and plaintiff was advised of such rejection by registered letter dated April 22, 1941. No part of the taxes paid for the years 1936, 1937, or 1938 has been repaid to plaintiff by way of credit, refund, or otherwise.

11. Plaintiff is the sole and absolute owner of the claim sued on, and has not made any transfer or assignment of said claim or any part thereof.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to recover and its petitions are therefore dismissed.

Judgment is rendered against the plaintiff for the cost of printing the records herein, the amount thereof to be entered by the clerk and collected by him according to law.

[fol. 29] ### Opinion

Madden, *Judge*, delivered the opinion of the court:

The question in this case is the proper method of computing the credit to which an American corporation is entitled

on its American income tax when it has received dividends from a foreign subsidiary which has paid income taxes to a foreign government upon the income a part of which has come to the American corporation as dividends.

Pertinent portions of the Revenue Act of 1936, some of the language of which is here under consideration, are as follows:

Sec. 131. (f) *Taxes of Foreign Subsidiary.*—For the purposes of this section a domestic corporation which owns a majority of the voting stock of a foreign corporation from which it receives dividends in any taxable year *shall be deemed to have paid the same proportion of any income, war-profits, or excess-profits taxes paid by such foreign corporation to any foreign country or to any possession of the United States, upon or with respect to the accumulated profits of such foreign corporation from which such dividends were paid, which the amount of such dividends bears to the amount of such accumulated profits: Provided,* That the amount of tax deemed to have been paid under this subsection shall in no case exceed the same proportion of the tax against which credit is taken which the amount of such dividends bears to the amount of the entire net income of the domestic corporation in which such dividends are included. The term "accumulated profits" when used in this subsection in reference to a foreign corporation, means the amount of its gains, profits, or income in excess of the income, war-profits, and excess-profits taxes imposed upon or with respect to such profits or income; and the Commissioner with the approval of the Secretary shall have full power to determine from the accumulated profits of what year or years such dividends were paid; treating dividends paid in the first sixty days of any year as having been paid from the accumulated profits of the preceding year or years (unless to his satisfaction shown otherwise), and in other respects treating dividends as having been paid from the most recently accumulated gains, profits, or earnings. In the case of a foreign corporation, the income, war-profits, [fol. 30] and excess-profits taxes of which are determined on the basis of an accounting period of less than one year, the word "year" as used in this subsection shall be construed to mean such accounting period.

The italics are supplied and indicate the particular language the meaning of which is in dispute.

The term "accumulated profits", found in the italicized portion, is defined later in the quoted part of the section as meaning the amount of the foreign corporation's income less the amount of income, war-profits or excess-profits tax paid to the foreign government.

An example of the operation of the section easier to grasp than plaintiff's situation may be given as follows: The A Company, an American corporation, has a wholly owned subsidiary in Canada, the C Company. The C Company has taxable income in Canada of $100,000, and is there taxed on that income at the rate of 20%, its Canadian tax thus being $20,000. Its remaining income is its "accumulated profits" according to the definition of section 131 (f). The C Company remits as a dividend to its sole stockholder, the A Company, the entire $80,000, and that amount is included by the A Company in its taxable income in the United States. To how much credit is the A Company entitled as against its income tax?

Plaintiff's claim is that the A Company would be entitled to credit for the entire $20,000 tax paid by the C Company in Canada. Defendant argues that the A Company would be entitled to credit for only $16,000, the amount of the tax paid by the C Company on the $80,000 remitted to the A Company and included in the A Company's taxable income.

Both parties agree that the fraction of the foreign tax which is to be credited at home is to be arrived at by using the dividends remitted (80,000) as the numerator and the "accumulated profits" (also 80,000 in the example) as the denominator. The fraction in the example is one over one, hence it does not affect the result. They equally agree that if any less amount of the C Company's income was remitted to the A Company as dividends and the balance retained as surplus by the C Company, the numerator of the fraction [fol. 31] would be that less amount, and the fraction would be, for example, 40,000 over 80,000 or one half. So there is no disagreement as to how to determine the applicable fraction.

But the parties disagree as to what amount of the foreign taxes to apply the fraction to, in order to produce the allowable credit on American taxes. The statute says the fraction should be applied to the income "taxes paid by such foreign corporation to any foreign country * * * upon or with respect to the accumulated profits of such foreign corporation from which such dividends were paid." As we

have seen, there is a specific definition of the term "accumulated profits" in the same paragraph of the statute. The defendant's contention, therefore, that the American credit is the amount of the 20% Canadian tax on $80,000, the amount of the C Company's accumulated profits, seems to fit the statutory language with exactness.

Plaintiff's contention would require that the part of the statute quoted above be read as if it said "taxes paid upon the total taxable income upon or with respect to which such taxes were paid by the foreign corporation." But we think the language cannot have been intended to mean that, for that was the very language of the corresponding section of the 1918 act (section 240 (c), 40 Stat. 1057, 1082) which was being revised when the present language was adopted in 1921. There is no reason to attribute to Congress an intention to substitute for a perfectly clear and unambiguous expression a doubtful and vague one which on its face seems to mean something else but which really means the same as the displaced clear expression.

In addition to the language, there is every reason why Congress should limit the credit to taxes paid upon that portion of the foreign income which became taxable income to the domestic taxpayer. It is hard to see why the American tax authorities should be interested in that portion of the foreign corporation's income which was taken from it by the foreign government as taxes, either for the purpose of taxing it, which the statute does not purport to do, or for the purpose of giving credit for taxes paid upon it, which is what plaintiff seeks to have done. The taxes paid upon that portion of the income are in no sense taxes paid upon Ameri- [fol. 32] can income, and there is no reason why they should be credited upon American income tax. The purpose of the credit provision is to avoid double taxation. *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1. But of course there is no double taxation upon that portion of the foreign income which is neither returned nor taxed as American income. An individual taxpayer is allowed to deduct taxes which have no relation to his income from his income, but he cannot subtract them from, nor credit them upon, his income tax. He thus saves on his income tax a small or larger percentage of such other taxes, depending upon the rate of his income tax. But plaintiff would deduct, in toto, not merely from its income, but from its income tax, foreign taxes paid upon foreign income which never became American income.

If plaintiff's contention is correct, a corporation can obtain a substantial tax advantage in its American income tax by carrying on its foreign business through a subsidiary rather than through a branch of its own. In the illustration used above, if the A Company's foreign branch made the profit of $100,000, that entire amount would be returnable as American income subject to tax, and the foreign tax of $20,000 would be credited against American income tax. But if it did the business through a subsidiary, its returnable American income would be only $80,000, yet it would be entitled to the same credit of $20,000 according to plaintiff's contention. An intention so to change the 1918 statute which had formerly not permitted this kind of discrimination, should not be imputed to Congress by a strained interpretation of statutory language.

Plaintiff urges, against the language of the statute and what seems to us the reason of the statute, its legislative history and administrative interpretation as supporting plaintiff's contentions.

The relevant legislative history is as follows: In the 1921 revision of the Revenue Act of 1918, section 240 (c), 40 Stat. 1057, 1082, had been omitted from the House bill because that bill had exempted dividends from taxation, hence there was no occasion for giving credit for taxes paid on foreign income from which dividends were paid. In the Senate bill however, dividends from foreign corporations were taxed; [fol. 33] but by inadvertence, as first drafted, it made no provision for credits for taxes paid by a foreign subsidiary corporation. Concerning the correctness of this omission, the Treasury representative before the Senate Committee said:

> I rewrote the old provision, safeguarding it from some abuses which it was open to, and closing up some of the gaps that were in the old provision. (Senate Hearings before the Committee on Finance, 67th Cong., 1st Sess., on H. R. 8245, Internal Revenue, Part 2, Oct 8, 1921, pp. 338-339.)

On the floor of the Senate, Senator Smoot offered on behalf of Senator Kellogg the amendment which is now section 131 (f) here in question. He said, *inter alia*, in explanation:

A provision of this kind, giving the credit to a domestic corporation which owns a majority of the voting stock of a foreign corporation, is contained in section 240 (c) of the revenue act of 1918. The amendment here under discussion merely reincorporates this credit in the proposed revenue act of 1921, with safeguards designed to protect the American tax as above described. In short, the amendment in question is merely an improved version of an existing provision of law. (61st Cong. Record, part 7, p. 7184.)

In the course of his explanation, he gave an example which is in accord with plaintiff's contention as to the meaning of the statute. This example was contradictory of the apparent meaning of the language of the amendment and of his closing statement, quoted above, that the amendment merely reincorporated the 1918 credit "with safeguards designed to protect the American tax as above described." To follow the example would in fact seriously impair the American tax.

Such a legislative history, containing a direct statement of purpose pointing in one direction and an example pointing in the other, is of no real assistance in interpreting the statute. One or the other must have been a mistake. If a conclusion must be drawn from Senator Smoot's explanation, it would seem to be that the direct statement of purpose is less likely to have been inadvertent than the figures given in the example.

[fol. 34] The administrative interpretation of the statute has been as follows: From 1921 to 1931 the department interpreted it in accordance with plaintiff's contention. In 1924 and 1926 the revenue act was reenacted without change material to our problem. In 1931 the department changed its interpretation, and since that time it has been in accordance with the defendant's contention. The section has been reenacted in 1932, 1934, 1936 and 1938 without change material to our problem. Congress has by reenactment acquiesced as frequently in the present departmental interpretation as in the earlier one, so that this history too is of no real assistance in the solution of our problem.

The case of *International Milling Co.* v. *United States*, 89 C. Cls. 128, involved the same question under section 131 (f)

of the Revenue Act of 1928. As we have said, up to 1931, the time that the tax there involved was imposed, administrative interpretation and Congressional reenactment both tended to support the construction here contended for by plaintiff. This court's decision in that case approved that construction. Administrative interpretation and Congressional reenactment since 1931 have all pointed in the other direction, which history tends to neutralize or destroy one of the reasons upon which the *International Milling* decision was based.

But whether that be a sufficient distinction or not, we have, upon a careful reconsideration of the question, concluded that the interpretation given to the 1928 statute in the *International Milling* decision is not the correct interpretation of the 1936 and 1938 acts here involved. We are aware that the United States Circuit Court of Appeals for the Second Circuit in the case of *F. W. Woolworth & Co.* v. *United States*, 91 F. (2d) 973, and the United States District Court for the Western District of Pennsylvania in the case of *Aluminum Co. of America* v. *United States*, 36 F. Supp. 23, reached the conclusion which plaintiff here urges. Nevertheless, our conclusion is that the tax to which the proportion is to be applied is the foreign tax paid only upon so much of the foreign income as constitutes accumulated profits, according to the definition of the statute. [fols. 35-36] It follows that plaintiff is not entitled to recover and its petition is, accordingly, dismissed.

It is so ordered.

Jones, *Judge;* Whitaker, *Judge;* and Littleton, *Judge,* concur.

DISSENTING OPINION

WHALEY, *Chief Justice,* dissenting:

I am of the opinion that the decision in the case of *International Milling Co.* v. *United States*, 89 C. Cls. 128, is correct. I can see no justification for overruling that decision because the Department has refused to follow it. Congress has not changed the law in subsequent enactments which tends to show acquiescence in that decision. The mere fact

that the Department refused to accept the decision is not persuasive in changing the ruling of the Court. The decision has been uniformly applied by other Courts as shown in the majority opinion.

[fols. 37-38] VI. JUDGMENT OF THE COURT—November 3, 1941

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover.

It Is Therefore Adjudged And Ordered that the plaintiff's petitions be and the same are hereby dismissed.

[fol. 39] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 40] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 9, 1942

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9263)